Dato' Dr Mahmud bin Mohd Nor (as the Chairman of the Preliminary Investigation Committee I, Malaysian Medical Council) & Anor v Dr Mohd Ismail bin Abdul Hamid

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCvC)(A)-1434–10 OF 2020
AZIZAH NAWAWI, LEE HENG CHEONG AND HASHIM HAMZAH JJCA
18 APRIL 2023

Professions — Medical practitioners — Preliminary investigation committee ('PIC') inquiry — PIC concluded its hearings into complaint against medical practitioner ('respondent') by recommending that Malaysian Medical Council ('MMC') hold inquiry against respondent over the complaint — High Court declared PIC's recommendation as null and void on ground PIC became legally incompetent to probe the complaint when number of members on its panel fell to two from the original three — Whether High Court erred in giving undue importance to reg 26(2) of Medical Regulations 1974 without considering proviso to reg 26(3) which declared that no vacancy in membership of PIC or any other defect in its constitution would invalidate its proceedings — Whether High Court should not have entertained respondent's piece-meal attack on disciplinary proceedings midway through its course — Whether respondent should have waited until MMC had made its decision — Whether Medical Act 1971 only allowed a decision of the MMC to be appealed against and not a decision of the PIC

Pursuant to reg 26 of the Medical Regulations 1974 ('the Regulations'), the second appellant ('MMC') appointed a preliminary investigation committee ('PIC') to look into a complaint the MMC had received against the respondent, a registered medical practitioner under the Medical Act 1971 ('Act 50'). A three-member panel consisting of the first appellant, one 'Dr Low' and a 'Dato Dr Ismail' formed the PIC which heard the complaint on the first two hearing dates. Before the third and final hearing date arrived, Dato Dr Ismail had passed away. The remaining two members of the PIC nevertheless proceeded with the third hearing, without any objection from the respondent or his lawyers, and came to a finding that there were grounds to support a charge against the respondent. The PIC recommended to the MMC that it hold an inquiry against the respondent with respect to the complaint. On being informed of the PIC's decision, the respondent filed an originating summons ('OS') in the High Court to declare the PIC's decision as null and void on the ground that when the PIC sat on the third hearing date and made the recommendation to the MMC, it was improperly constituted in law. The MMC successfully applied to strike out the respondent's OS but the decision

was overturned by the Court of Appeal which ordered the High Court to hear the OS on its merits. On hearing the OS as directed, the High Court judicial commissioner ('JC') allowed it after finding that the PIC was rendered legally incompetent to function following Dato Dr Ismail's demise and therefore its recommendation to the MMC was null and void. The JC held that even though the PIC fulfilled the quorum requirement of two members, as provided under reg 26(4) of the Regulations, the third hearing of the PIC and its decision were invalid because reg 26(2) mandatorily specified that a PIC appointed to hear a complaint shall consist of at least three members.

Held, unanimously allowing the appeal and setting aside the JC's decision:

(1) Section 31 of Act 50 allowed any person aggrieved by an order made against him by the MMC the right to appeal against the order to the High Court. But no decision, order or direction of the PIC was appealable under s 31 of Act 50. The respondent's OS in the High Court was not an appeal against any decision of the MMC. He was challenging the process of the PIC, which was only tasked to make an inquiry into the complaint lodged against him. The PIC was not statutorily empowered to make any decision on the complaint as only the MMC had the disciplinary jurisdiction under Act 50. Nothing in Act 50 or the Regulations allowed an appeal against an order made by the PIC (see paras 23–26).

(2) The respondent could not challenge the early stages of the decision-making process without awaiting the final decision of the MMC. The proper process/procedure was for the respondent to undergo the remaining steps of the disciplinary process before the MMC made the determinative or final decision. By granting the declaration sought by the respondent, the JC had allowed a piece-meal attack on the disciplinary process, thereby delaying the actual process itself. This could be seen from the fact that as in 2023, nearly ten years had lapsed before the MMC could deal with the complaint that was lodged against the respondent. It was therefore premature for the respondent to seek the declaration from the court. The disciplinary process should be allowed to run its natural course in accordance with Act 50 and the Regulations. The only decision that could adversely affect the respondent was the MMC's decision under s 30 of Act 50 and not the recommendation made by the PIC, which did not finally dispose of the rights of the respondent (see paras 27 & 37–38).

(3) The JC erred in giving undue importance to reg 26(2) and scant consideration to reg 26(4) and the proviso to reg 26(3). Regulation 26(2) could not be read in isolation or to prevail over the other provisions of reg 26. All the provisions of reg 26 had to be read together as a whole and construed harmoniously with one another to avoid ambiguity or absurdity in their application. The JC wrongly held that the word 'shall' in reg 26(2) was mandatory such that the PIC had to sit with at least three

members at all times in order for the sitting to be valid. The JC failed to consider that the proviso to reg 26(3) expressly stated that no act done or proceeding taken under the Regulations shall be questioned on the ground of any vacancy in the membership or any defect in the constitution of the PIC (this proviso had now become part of reg 37(7) in the 2017 Regulations). The purpose of the proviso was to cater for and to regularise situations which would result in the vacancy of the membership of the PIC or any defect in the PIC's composition. Hence, to prevent the saving provision from being rendered useless, the word 'shall' in reg 26(2) had to be construed as directory and not mandatory (see paras 43–44, 47–49, 61–62 & 65).

(4) The proviso to reg 26(3) clearly empowered the PIC to continue with the preliminary investigation of the complaint even though there was an absence of members comprising the PIC panel or if there was any other defect in its constitution. The JC took the view that the proviso could only save acts or proceedings of the PIC which were done bona fide and that the PIC's failure to inform the respondent of Dato Dr Ismail's death was an act that was not bona fide. Regulation 26 made no mention of 'bona fide' and the Regulations did not require MMC to inform the respondent of the demise of a member of the PIC. The JC erred in law by adding a new requirement of 'bona fide' into reg 26 when it was not there in the first place. Although Dato Dr Ismail's demise was not disclosed at the third hearing of the PIC, the first appellant made it clear at the outset that he and Dr Low fulfilled the quorum requirement and would continue with the hearing. No objection was raised either by the respondent or his lawyers who elected to proceed with the hearing (see paras 54–58).

(5) The validity of the third hearing of the PIC could only be questioned if reg 26(4) had been breached in that there was a quorum failure and that less than two members had met and made the recommendation to the MMC. This, however, was not the case, as there was no breach of the quorum requirement for all the three hearings of the PIC (see paras 64 & 71).

[Bahasa Malaysia summary

Menurut peraturan 26 Peraturan Perubatan 1974 ('Peraturan tersebut'), perayu kedua ('MMC') melantik jawatankuasa siasatan awal ('PIC') untuk meneliti aduan yang diterima oleh MMC terhadap responden, seorang pengamal perubatan berdaftar di bawah Akta Perubatan 1971 ('Akta 50'). Panel tiga anggota terdiri daripada perayu pertama, seorang 'Dr Low' dan 'Dato Dr Ismail' membentuk PIC yang mendengar aduan tersebut pada dua tarikh pendengaran pertama. Sebelum tarikh perbicaraan ketiga dan terakhir tiba, Dato Dr Ismail telah meninggal dunia. Baki dua ahli PIC bagaimanapun meneruskan perbicaraan ketiga, tanpa sebarang bantahan daripada responden

atau peguamcaranya, dan membuat dapatan bahawa terdapat alasan untuk menyokong pertuduhan terhadap responden. PIC mengesyorkan kepada MMC bahawa ia mengadakan siasatan terhadap responden berkenaan dengan aduan tersebut. Apabila dimaklumkan tentang keputusan PIC, responden memfailkan saman pemula ('SP') di Mahkamah Tinggi untuk mendapatkan deklarasi bahawa keputusan PIC sebagai terbatal dan tidak sah atas alasan bahawa apabila PIC bersidang pada tarikh perbicaraan ketiga dan membuat syor kepada MMC, ia telah dibentuk secara tidak wajar dari segi undang-undang. MMC berjaya memohon untuk membatalkan OS responden tetapi keputusan tersebut telah dibatalkan oleh Mahkamah Rayuan yang memerintahkan Mahkamah Tinggi mendengar SP atas meritnya. Apabila mendengar SP seperti yang diarahkan, pesuruhjaya kehakiman Mahkamah Tinggi ('PK') membenarkannya selepas mendapati PIC telah menjadi tidak cekap dari segi undang-undang untuk berfungsi berikutan kematian Dato Dr Ismail dan oleh itu syornya kepada MMC adalah terbatal dan tidak sah. PK memutuskan bahawa walaupun PIC memenuhi keperluan korum dua ahli, seperti yang diperuntukkan di bawah peraturan 26(4) Peraturan tersebut, pendengaran ketiga PIC dan keputusannya adalah tidak sah kerana peraturan 26(2) secara mandatori menyatakan bahawa PIC dilantik untuk mendengar aduan hendaklah terdiri daripada sekurang-kurangnya tiga orang ahli.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan PK:

(1) Seksyen 31 Akta 50 membenarkan mana-mana orang yang terkilan dengan sesuatu perintah yang dibuat terhadapnya oleh MMC mempunyai hak untuk merayu terhadap perintah tersebut ke Mahkamah Tinggi. Tetapi tiada keputusan, perintah atau arahan PIC boleh dirayu di bawah s 31 Akta 50. SP responden di Mahkamah Tinggi bukanlah rayuan terhadap sebarang keputusan MMC. Beliau mencabar proses PIC, yang hanya ditugaskan untuk membuat siasatan terhadap aduan yang dibuat terhadapnya. PIC tidak diberi kuasa dari segi undang-undang untuk membuat sebarang keputusan mengenai aduan tersebut kerana hanya MMC yang mempunyai bidang kuasa tatatertib di bawah Akta 50. Tiada apa-apa pun dalam Akta 50 atau Peraturan membenarkan rayuan terhadap perintah yang dibuat oleh PIC (lihat perenggan 23–26).

(2) Responden tidak boleh mencabar peringkat awal proses membuat keputusan tanpa menunggu keputusan muktamad MMC. Proses/prosedur yang sepatutnya adalah untuk responden melalui baki peringkat proses disiplin sebelum MMC membuat keputusan yang pasti atau muktamad. Dengan memberikan deklarasi yang dimohon oleh responden, PK telah membenarkan serangan kecil-kecilan terhadap proses tatatertib, sekali gus melambatkan proses yang sebenarnya. Ini

dapat dilihat daripada fakta bahawa pada tahun 2023, hampir sepuluh tahun telah berlalu sebelum MMC dapat menangani aduan yang dikemukakan terhadap responden. Oleh itu adalah terlalu awal bagi responden untuk mendapatkan deklarasi daripada mahkamah. Proses tatatertib harus dibenarkan berjalan secara semula jadi mengikut Akta 50 dan Peraturan. Satu-satunya keputusan yang boleh memberi kesan buruk kepada responden adalah keputusan MMC di bawah s 30 Akta 50 dan bukannya syor yang dibuat oleh PIC, yang akhirnya tidak melupuskan hak responden (lihat perenggan 27–37 & 38).

(3) PK terkhilaf dalam memberikan kepentingan yang tidak wajar kepada peraturan 26(2) dan sedikit pertimbangan kepada peraturan 26(4) dan proviso kepada peraturan 26(3). Peraturan 26(2) tidak boleh dibaca secara berasingan atau mengatasi peruntukan lain dalam peraturan 26. Semua peruntukan peraturan 26 perlu dibaca bersama secara keseluruhan dan ditafsirkan secara harmoni antara satu sama lain untuk mengelakkan kekaburan atau ketidakwajaran dalam pemakaiannya . PK tersalah memutuskan bahawa perkataan 'hendaklah' dalam peraturan 26(2) adalah mandatori sehingga PIC perlu bersidang dengan sekurang-kurangnya tiga ahli pada setiap masa agar persidangan tersebut sah. PK gagal mempertimbangkan bahawa proviso peraturan 26(3) dengan jelas menyatakan bahawa tiada tindakan yang dilakukan atau prosiding yang dijalankan di bawah Peraturan tersebut boleh dipersoalkan atas alasan terdapat sebarang kekosongan dalam keahlian atau sebarang kecacatan dalam perlembagaan PIC (proviso ini kini telah menjadi sebahagian daripada peraturan 37(7) dalam Peraturan 2017). Tujuan proviso adalah untuk memenuhi dan untuk mengatur situasi yang akan mengakibatkan kekosongan keahlian PIC atau sebarang kecacatan dalam komposisi PIC. Oleh itu, untuk mengelakkan peruntukan penyelamat daripada menjadi tidak berguna, perkataan 'hendaklah' dalam peraturan 26(2) perlu ditafsirkan sebagai direktori dan bukan mandatori (lihat perenggan 43–44, 47–49, 61–62 & 65).

(4) Proviso peraturan 26(3) jelas memberi kuasa kepada PIC untuk meneruskan siasatan awal aduan walaupun terdapat ketiadaan ahli yang terdiri daripada panel PIC atau jika terdapat sebarang kecacatan lain dalam perlembagaannya. PK berpandangan bahawa proviso tersebut hanya boleh menyelamatkan akta atau prosiding PIC yang dilakukan secara bona fide dan kegagalan PIC memaklumkan responden mengenai kematian Dato Dr Ismail adalah satu perbuatan yang tidak bona fide. Peraturan 26 tidak menyebut tentang 'bona fide' dan Peraturan tersebut tidak memerlukan MMC untuk memaklumkan responden tentang kematian ahli PIC. PK terkhilaf dari segi undang-undang dengan menambah keperluan baharu 'bona fide' ke dalam peraturan 26 apabila ia tidak wujud pada mulanya. Walaupun kematian Dato Dr Ismail tidak didedahkan pada perbicaraan ketiga PIC, perayu pertama menjelaskan

pada awalnya bahawa beliau dan Dr Low memenuhi syarat korum dan akan meneruskan pendengaran. Tiada bantahan dibangkitkan sama ada oleh responden atau peguamcaranya yang memilih untuk meneruskan perbicaraan (lihat perenggan 54–58).

(5) Kesahihan pendengaran ketiga PIC hanya boleh dipersoalkan jika peraturan 26(4) telah dilanggar kerana terdapat kegagalan korum dan kurang daripada dua ahli telah bertemu dan membuat syor kepada MMC. Ini, bagaimanapun, tidak berlaku, kerana tidak ada pelanggaran keperluan korum untuk ketiga-tiga pendengaran PIC (lihat perenggan 64 & 71).]

Cases referred to

Choo Yeoh Jee & Ors v Pesuruhjaya Sukan [2016] MLJU 1816; [2016] 4 CLJ 298, HC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345; [1994] 4 CLJ 285, FC (refd)

Datuk Dr Hj Hamid Sultan bin Abu Backer v Pengerusi Jawatankuasa Etika Hakim-Hakim ('Chairman of The Judges' Ethics Committee') & Anor [2022] 11 MLJ 335; [2021] 8 CLJ 708, HC (refd)

Dr Colin Lee Soon Soo v Majlis Perubatan Malaysia [2011] 1 CLJ 907, HC (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35; [1985] CLJ Rep 122, SC (refd)

Garden City Development Bhd v Collector of Land Revenue, Federal Territory [1982] 2 MLJ 98; [1982] 1 LNS 4, PC (refd)

Koay Theam Hock v Lembaga Rayuan Tatatertib Institut Akauntan Malaysia & Anor [2020] MLJU 681; [2020] 1 LNS 564, HC (refd)

Majlis Perbandaran Seremban v Tenaga Nasional Bhd [2020] 12 MLJ 1, FC (refd)

Malayan Banking Berhad v International Tin Council and another appeal [1989] 3 MLJ 286, SC (refd)

Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor [2013] 1 MLJ 329, CA (refd)

Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam [2020] MLJU 1285; [2020] 10 CLJ 181, HC (refd)

Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar [2020] 1 MLJ 141; [2020] 1 CLJ 1, FC (refd)

Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd [2019] 1 MLJ 495, CA (refd)

Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors [2009] 3 MLJ 437; [2009] 5 CLJ 153, CA (refd)

Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the

estate of Balia bin Munir, deceased) [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)
Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor [2008] 1 MLJ 164, CA (folld)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 122, 127
Legal Profession Act 1976 ss 94(3)(c), (3)(o), 103D(2), (4)
Medical Act 1971 ss 29(2), 30, 31, 31(1)
Medical Regulations 1974 (repealed by Medical Regulations 2017) regs 8, 26, 26(2), (3), (4), 27, 28, 29, 30, 31, 37(7)

Appeal from: *Dr Mohd Ismail bin Abdul Hamid v Dato' Dr Mahmud bin Mohd Noor & Anor* [2020] MLJU 2177 (Court of Appeal, Putrajaya)

Harjinder Kaur a/p Ajaib Singh (with Choy Moon Moon) (Shahrizat Rashid & Lee) for the appellants
T Gunaseelan (with Keshvinjeet Singh) (Gunaseelan & Assoc) for the respondent.

Azizah Nawawi JCA:

[1] This is the appellants' appeal against the decision of the learned judicial commissioner ('JC') dated 9 September 2020 in allowing the respondent's originating summons dated 3 May 2016 ('OS'), inter alia, for the following orders:

(a) a declaration that the Preliminary Investigation Committee I ('PIC') is irregular and/or invalid in law; and

(b) a declaration that the decision of the PIC on 28 May 2014 is null and void.

[2] Having considered the submissions of all parties, we have allowed the appeal and set aside the decision of the learned JC.

THE SALIENT FACTS

[3] The respondent is a registered medical practitioner under the Medical Act 1971 ('Act 50').

[4] The first appellant is the appointed Chairman of the PIC established by the second appellant, the Malaysian Medical Council ('MMC').

[5] Vide a letter dated 21 January 2005, a complaint was lodged with the MMC against the respondent pertaining to the conduct and treatment a complainant had received from the respondent ('the complaint').

[6] The MMC had appointed the PIC, which composed of three members pursuant to reg 26 of the Medical Regulations 1974 (the '1974 Regulations'):

(a) the first appellant;

(b) Dr Low Nan Hang ('Dr Low'); and

(c) Dato' Dr Ismail bin Saad ('Dr Ismail').

[7] The PIC was to conduct a preliminary investigation into the complaint and make a recommendation to the MMC on whether to hold an inquiry or otherwise against the respondent, depending on the findings of the PIC. The function of the PIC is not to make a finding of guilt against the respondent, but merely a finding of whether there are sufficient grounds to recommend that the MMC hold an inquiry against the respondent.

[8] Following the preliminary investigation inquiry conducted by the PIC on 13 February 2006 ('first hearing'), 22 May 2006 ('second hearing') and 23 April 2014 ('third hearing'), it was found that there are grounds to support the charge against the respondent and a recommendation was made for an inquiry to be held by the MMC against the respondent ('recommendation'). The recommendation was communicated to the respondent vide the MMC's letter dated 28 May 2014.

[9] The respondent then filed the OS, and the appellants subsequently filed a notice of application dated 15 June 2016 to strike out the OS premised on the fact that there were four previous actions filed by the respondent that constitute similar facts as the present matter.

[10] The OS was struck out in the High Court vide order dated 17 October 2016, and the respondent filed an appeal against the said High Court order, to which this court had allowed the respondent's appeal against the said High Court decision and the matter was remitted to the High Court on its merits

[11] The learned judicial commissioner allowed the OS on 9 September 2020 and the appellants subsequently filed a notice of appeal dated 2 October 2020 to appeal against the decision of the learned JC in allowing the OS.

DECISION OF THE HIGH COURT

[12] The learned JC ruled that the composition of the PIC complied with reg 26(2) when the PIC was formed in 2005. The PIC then consisted of three members namely the first appellant, Dr Low and Dr Ismail. During the first hearing and the second hearing, the PIC was properly constituted when all three members attended the meetings However, Dr Ismail passed away on 7 March 2014, whilst the preliminary investigation by the PIC was still ongoing.

[13] During the third hearing on 23 April 2014, only the first appellant and Dr Low attended the hearing. The learned JC then held that this resulted in the PIC being not properly constituted and was irregular or invalid in law. Likewise, when the PIC made its recommendation, the PIC was not properly constituted and, in the circumstances, the recommendation was declared as null and void.

OUR DECISION

Disciplinary proceedings

[14] The MMC is a statutory body established under s 30 of Act 50. The MMC's functions under Act 50, inter alia, are to register medical practitioners, to regulate the practice of medicine and to regulate the standards of practice as well as the professional conduct and ethics of registered medical practitioners

[15] Being a registered medical practitioner under Act 50, the respondent is subject to the disciplinary inquiry procedures provided under Act 50 and the 1974 Regulations, similar to other professional bodies who are subject to regulatory law of like manner.

[16] The disciplinary proceedings are provided in the 1974 Regulations Under reg 27, if a complaint or information is lodged against a practitioner, alleging their conviction in Malaysia or elsewhere for a punishable offence, has been guilty of infamous conduct in any professional respect, has obtained registration by fraud or misrepresentation, or removal from a medical practitioners' registry outside Malaysia, the President of the MMC shall forward the complaint or information to a PIC Chairman.

[17] The PIC may dismiss a complaint summarily under reg 28.

[18] If the PIC has reasonable grounds to suspect the complaint or information to be true, pursuant to reg 29, the PIC will investigate:

A (a) if the PIC concludes that there is not enough evidence to support the accusation, they may recommend to the MMC that no action be taken;

(b) on the other hand, if the statements provide enough support for the allegation, the PIC may formulate the charge and inform the
B practitioner that they have the option to present their defence against the charge; and

(c) if the practitioner decides not to respond, the PIC shall recommend that the MMC conduct an inquiry.

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[19] However, if the practitioner elects to make his defence before the PIC, his statement will be documented. If the PIC finds that there is insufficient evidence to support the charge, they may recommend to the MMC that no action be taken. However, if the PIC determines that there are valid grounds to
D support the charge, they may advise the MMC to conduct an inquiry.

[20] From the PIC, the records of the inquiry before the PIC shall be transmitted to the MMC under reg 30.

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[21] Regulation 31 governs the MMC inquiry process If, upon concluding the inquiry, the MMC determines that there is no basis for a case against the practitioner, it will order the charge to be dismissed and inform the practitioner accordingly. However, if the MMC finds the practitioner guilty of any disciplinary matter stated in s 29(2) of Act 50, it shall inform the practitioner
F of its finding and the grounds for its decision, and request the practitioner to present any plea in mitigation. After hearing any plea in mitigation, the MMC may exercise any of its powers specified in s 30 of the Act 50.

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[22] It is clear that there is a two-tier process in relation to a disciplinary inquiry against medical practitioners under Act 50 and the 1974 Regulations, whereby the first stage (the preliminary stage) is conducted by the PIC, prior to the second stage which is before the MMC. Only at the MMC stage would there be a ruling as to whether the respondent is guilty or otherwise of the
H disciplinary charge.

[23] From the decision of the MMC, s 31 of Act 50 provides an avenue of appeal to the High Court against the orders of the MMC, where sub-s (1) reads:

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> (1) Any person who is aggrieved by any order made in respect of him by the Council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and the High Court may thereupon affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper; the cost of the appeal shall be in the discretion of the High Court.

[24] In the present case, the application before the High Court is not an appeal from the decision of the MMC. The respondent was challenging the process of the PIC, which is only tasked to make an inquiry into the complaint lodged against the respondent. The PIC is not statutorily empowered to make a decision on the complaint as only the MMC has the disciplinary jurisdiction under Act 50.

[25] We are therefore of the considered opinion and we agree with the appellants that s 31 of Act 50 provides a statutory guarantee of the right of the respondent to appeal to the High Court against the decision of MMC in the exercise of its disciplinary jurisdiction. Until the MMC exercises its disciplinary jurisdiction under Act 50, any decision, order or direction given by the PIC is not an order which is appealable under s 31 of Act 50.

[26] In the present appeal, the MMC has not heard nor made any decision yet. Unless and until the MMC makes an order/decision in the course of its own inquiry under s 31, the respondent should not be allowed to challenge the PIC decision as the same is not appealable. Indeed, there is nothing in the Act 50 nor the 1974 Regulations that allows an appeal against the order made by the PIC.

[27] The respondent should not be allowed to challenge the early stages of the decision-making process, without awaiting the final decision of the MMC. In granting the declaratory orders, the learned JC had allowed piece meal attacks on the disciplinary process, thereby delaying the actual process itself. This can be seen from the fact that as in 2023, nearly ten years had lapsed before the MMC can deal with the complaint lodged against the respondent. Therefore, we are of the considered opinion that it is premature at this juncture for the respondent to seek a declaration from the court. The disciplinary process should be allowed to run its natural course in accordance with Act 50 and the 1974 Regulations, as the only decision that the respondent will be adversely affected with is the final decision of the MMC pursuant to s 30 of Act 50.

[28] In *Dr Colin Lee Soon Soo v Majlis Perubatan Malaysia* [2011] 1 CLJ 907, the applicant was notified that an inquiry before the PIC, convened by the MMC under reg 26 of the 1974 Regulations to investigate the complaint against him. During the inquiry, it was revealed that Dr Mazlan had lodged the complaint on behalf of the respondent and not as an individual. In view of the fact that the respondent was the actual complainant, the applicant protested against the proceedings citing that they were unfair and violated the principles of natural justice.

[29] However, the applicant was informed by the Chairman of the PIC that the respondent itself had considered and rejected the applicant's preliminary objection, and directed the PIC to proceed with the inquiry. No grounds of decision for the dismissal of the preliminary objection were given. The applicant therefore requested for the inquiry to be adjourned pending an application to court for judicial review against the respondent's decision. The applicant claimed that the respondent was the complainant, judge, jury and executioner and therefore there can be no fair and unbiased hearing for the applicant. In dismissing the application, Mohd Zawawi Salleh J (as he then was) held as follows:

> [19] On the evidence before me, it is clear that the internal decisions making procedures have not been exhausted and the 'ultimate decision/order' of the Council on the complaint is unknown. It is not for this court to speculate upon the outcome of such investigation might be.

[30] In *Taylor's College Sdn Bhd v Ketua Pengarah Kesatuan Sekerja Malaysia & Ors* [2009] 3 MLJ 437; [2009] 5 CLJ 153 Suriyadi Halim Omar JCA (as he then was) at pp 448–449 (MLJ); pp 165–166 (CLJ) said:

> [22] Apart from the reason as prognosed above, *this appeal could also be dismissed on the ground that the judicial review application by the appellant merely served to fragment the decision-making process and hence premature. We were not convinced that a 'decision' existed here that was amenable to judicial review in the context of judicial or administrative proceedings The decision of the first respondent could not be said to have effectively disposed of the matter whereby its decision was final and determinative of the issue under consideration.*
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> [23] The High Court in *Australian Broadcasting Tribunal v Bond & Ors 94 ALR 11 when considering whether a decision was amenable to judicial review under the provisions of the Administrative Decisions (Judicial Review) Act 1977 had occasion to remark:*
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> > ... On the one hand, the purposes ... are to allow persons aggrieved by the administrative decision-making processes of government a convenient and effective means of redress and to enhance those processes On the other hand, in so far as the ambit of the concept of 'decision' is extended, there is a greater risk that the efficient administration of government will be impaired ... *To interpret 'decision' in a way that would involve a departure from the quality of finality would lead to fragmentation of the processes of administrative decision-making and set at risk the efficiency of the administrative process*
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> [24] In *Kaneka Paste Polymers Sdn Bhd v Ketua Pengarah Perhubungan Perusahaan & Ors* [2005] 7 MLJ 132; [2005] 1 LNS 276; [2005] 5 MLRH 86 at p 89 Raus J (as he then was) had this to say:
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> > 8. Looking at the whole scheme of s 9 above, *I am in agreement with the learned Senior Federal Counsel that the decision which can be reviewed under O 53 of the RHC must be the decision of the Minister under s 9(5)*. Section 9(1) to s 9(4C) merely prescribes the procedures to be taken by the DGIR and the DGTU. But

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the power to grant recognition can only be made by the Minister under s 9(5). *No doubt the decision of DGTU conveyed to the applicant in a letter dated 29th March 200 was made under statutory authority, but not all decision made under statutory authority is subject to judicial review. To me, for a decision to be subjected to judicial review, it must go beyond what is merely administrative or procedural. Moreover, in this case the process for the Union recognition is midway before the decision of a Minister under* s 9(5). *To entertain the applicant's application would hamper the smooth workings of a claim for recognition as it allows piece meal attacks at every stage of the decision process Thus, the process for recognition should be allowed to proceed to enable the Minister to decide on the matter as provided by* s 9(5). (Emphasis added.)

B

C

[31] In *Choo Yeoh Jee & Ors v Pesuruhjaya Sukan* [2016] MLJU 1816; [2016] 4 CLJ 298, the High Court held that that a challenge on an interlocutory decision is a premature challenge which should be dismissed. The High Court held that:

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[42] *I agree with submissions of learned counsel for the respondent that the applicants having elected to avail themselves of their right of appeal to the Minister under* s 21(1) *of the Act must await the Minister's decision.* The applicants ought to give reasonable time to the Minister to decide on the appeal. The appeal was made on 4 May 2015 and a month later, ie, on 10 June 2015, the applicants filed this judicial review application. In *HSBC Bank Malaysia Bhd v Menteri Sumber Manusia, Malaysia & Anor (No 2)* [2012] 5 MLJ 593; [2011] 1 LNS 106, the court held that an application for judicial review made before any decision on recognition is made by the Minister under s 9(5) of the Industrial Relations Act (Act 177) is premature and merely serves to fragment the decision making process and attacks the process by stages Similarly, in *Kaneka Paste Polymers Sdn Bhd v Ketua Pengarah Perhubungan Perusahaan & Ors* [2005] 7 MLJ 132; [2005] 1 LNS 276, the court held that not all decisions made under statutory authority is subject to judicial review. In that case the applicants applied to quash the decision of the Director General of Trade Unions on the issue of competency under s 9 of Act 177. The court in refusing leave and dismissing the application held that:

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> To entertain the applicant's application would hamper the smooth workings of a claim for recognition as it allows piece meal attacks at every stage of the decision process

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[43] Similarly, *to allow the applicants to attack the decision of the respondent without awaiting the outcome of their appeal to the Minister would amount to allowing the applicants to challenge one stage of the decision-making process, without awaiting the final decision. And the court should not allow such piece meal attacks* The final decision in the decision process to revoke registration of a sports body is that of the Minister; and when an appeal is lodged to the Minister, it would be prudent to await that decision by giving the Minister reasonable time. Otherwise, the legislative intent found in Act 576 would be defeated; and the courts would be usurping the powers of the Minister. As such, I find that the applicants' application is clearly premature. (Emphasis added.)

I

[32] In *Koay Theam Hock v Lembaga Rayuan Tatatertib Institut Akauntan Malaysia & Anor* [2020] MLJU 681; [2020] 1 LNS 564, the Disciplinary Committee ('DC') of the Malaysian Institute of Accountants has not conducted the hearing of the complaint against the applicant. Before the DC, the applicant had raised a preliminary objection ('PO') on the charge against him and on the composition of the Investigation Committee. When the DC dismissed the PO, the applicant had appealed to the Disciplinary Appeal Board, which had dismissed the applicant's appeal. On an application to the High Court, the same was dismissed by the learned judge on the basis of prematurity:

> [18] In the present case, it is common ground that the DC has not conducted the hearing of the complaint against the applicant. Before the DC, the applicant had raised a PO on the charge and the composition of the IC. When the DC dismissed the PO, the applicant had appealed to the DAB, which had dismissed the applicant's appeal.
>
> [19] *Therefore, I am of the considered opinion that there is merit in the respondents' preliminary objection on the grounds of prematurity. The DC's decision on the PO raised by the applicant is only an interlocutory decision, not a final determination of the disciplinary proceedings against the applicant. The applicant should have allowed the disciplinary proceedings before the DC to conclude, and thereafter to appeal against the impugn decision to the DAB. To challenge an interlocutory decision, which is not the final determination of the disciplinary proceeding by the DC, is a premature challenge which should be dismissed*. In *Regina v Chief Constable of Merseyside Police, ex parte Merrill* [1989] 1 WLR 1077, the English Court of Appeal held that the normative rule is that an aggrieved party should await the final outcome of a disciplinary hearing prior to seeking judicial review. The court held that:
>
> > There can be cases in which the evidence is so substantial that it is sensible to give separate consideration to a preliminary objection but these must be very rare and I do not think that this was such a case. It must be even rarer to have a situation in which judicial review should even be considered before a Chief Constable has reached a final decision on the complaint, if indeed one can be imagined. Normally, the time for judicial review would not arise, if at all, before the appeal tribunal has given its decision. (Emphasis added.)

[33] In *Datuk Dr Hj Hamid Sultan bin Abu Backer v Pengerusi Jawatankuasa Etika Hakim-Hakim ('Chairman of The Judges' Ethics Committee') & Anor* [2022] 11 MLJ 335; [2021] 8 CLJ 708, the High Court held that judicial review is untenable because there was no final decision that has conclusively determined the rights of the applicant. The learned judge held as follows:

> [68] According to the facts of the case, it is the applicant's contention that the first respondent had examined both of the complaints against the applicant the first respondent then found that the complaints have merit and referred the matter to the second respondent. Subsequently, the first respondent through a notice dated 10

August 2020 informed the applicant of the alleged breach of JCE 2009. The respondents gave the applicant the opportunity to make a written representation. Furtherance to that, the applicant then sent his written reply. Upon examined the applicant's reply, the respondents found merits in the complaints Consequently, the respondents invited the applicant to be heard. Throughout the entire process, the applicant is represented by a solicitor. However, the enquiry before the respondents are halted due to the interim stay granted by this court. The proceeding has yet to be completed.

[69] *Therefore, this court concedes with the Attorney General's Chambers' submission that there is no decision that has conclusively determined the rights of the applicant as the Judge of Court of Appeal*. Nothing has affected the right of the applicant to pursue his defence in the ongoing proceedings before the second respondent. There has not been any decision made by the second respondent and the applicant has also not been affected by the decision of the respondent. The enquiry has not even taken place at this moment. Therefore, the respondents should be allowed to complete the enquiry in order to determine whether the applicant had breached the Judges' Code of Ethics 2009.

[70] *Suffice to say that the enquiry proceeding against the applicant is still at the early stage. The applicant has yet to appear before the respondents* Since enquiry has been postponed and the respondents have not heard and decide on the applicant's representation, *then the court agrees with the Attorney General's Chambers' submission that the present proceeding is pre-mature. The applicant has not been found breaching the JCE 2009 as yet.* The respondents might have dismissed the complaints if they find the breaches are not proven. (Emphasis added.)

[34] In *Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam* [2020] MLJU 1285; [2020] 10 CLJ 181, the Disciplinary Committee ('DC') made a finding that the applicant is guilty of dishonest and fraudulent conduct, in breach of s 94(3)(c) of the Legal Profession Act ('the LPA') and guilty of conduct which was unbefitting of an advocate and solicitor under s 94(3)(o) of the LPA. The DC made a recommendation that the applicant be suspended from practice for one month and a fine of RM5,000. The respondent, ('the Disciplinary Board/DB') affirmed the DC's finding on liability but disagreed with the punishment and consequently, issued a notice dated 4 November 2016 to the applicant to appear before it pursuant to s 103D(2) and (4) of the LPA with a view to enhance the punishment. The applicant then applied for and obtained leave to apply for judicial review against the DB's ruling.

[35] The High Court had struck out the judicial review application filed by the applicant on the grounds that the decision of the respondent was not amenable to judicial review and that the applicant's application for judicial review was premature and amounted to an attempt to short-circuit the statutory disciplinary and appellate process provided in the LPA. On appeal to the Court of Appeal, this court made the following findings:

A [24] It can be seen that the main reason which persuaded the learned High Court judge to allow the striking out of the judicial review claim was the fact that the commencement of the judicial review proceeding was premature.

...

B [67] *In our view, the act of the Disciplinary Board vide notice dated 4 November 2016 is itself not a reviewable decision but a step in the process which will ultimately lead to a decision which is reviewable after the Disciplinary Board imposed the punishment under s 94 of the LPA 1976.*

[68] In this present case, the applicant has a right of appeal to the High Court C pursuant to s 103E of the LPA 1976 in respect of any decision made by the respondent in affecting the applicant. Thus, the applicant's remedy, if he is dissatisfied with the decision of the respondent dated 13 October 2016, is to wait for the respondent to make an order under s 103D of the LPA 1976 after hearing the applicant on the issue of enhancement of punishment and then to file an appeal to D the High Court pursuant to s 103E of the LPA 1976. *In this circumstance, the applicant's application for judicial review is premature and amounts to an attempt to short-circuit the statutory disciplinary and appellate process provided in the LPA 1976.*

...

E [72] Hence, from the reading of the then s 103E(2) of the LPA 1976*, it seems clear that the law as it then stood precluded the applicant from moving the respondent's decision of 13 October 2016 into this court for judicial review.*

[73] *Therefore, we should not intervene at this stage until the Disciplinary Board has considered the form of punishment to be imposed on the applicant under* s 94 of the LPA F 1976. Accordingly, this appeal should be dismissed, but without prejudice to such further application as the applicant may desire to make in the light of the proceedings taken and the orders to be made by the Disciplinary Board. (Emphasis added.)

G **[36]** Therefore, in all the cases above, the courts have elected not to intervene in the various stages of the proceedings, unless and until a final or determinative decision was reached by the relevant authority pursuant to the relevant statutory provisions. Except in peculiar and exceptional circumstances, we are of the considered opinion that where statutes have H provided the decision-making process, this should be adhered to, so that the relevant authority is allowed to complete the process and make a final determination. Thereafter, the authority's final determination can be challenged in the courts

I **[37]** In the present appeal, similar to the position in *Ong Keh Keong*, we find that where there is a disciplinary process that provides due process to be observed, the respondent is not entitled to skip that process and use the courts as a means to seek what he wants, but to avail himself of the said due process The proper process/procedure is for the respondent to undergo the remaining

steps of the disciplinary process, before the MMC makes the determinative/final decision. At the stage of the PIC, there is no actual decision nor sanction that can be imposed by the PIC. The respondent is not adversely affected by the recommendation made by the PIC.

[38] In the present case however, instead of participating in the disciplinary inquiry to be conducted by the MMC, the respondent had attempted to short-circuit the statutory disciplinary process provided under Act 50 and the 1974 Regulations by filing the OS seeking a declaration. What the respondent is seeking here is to challenge the decision and/or the process of the PIC which does not finally dispose of the rights of the respondent. Therefore, it is our considered opinion that the application seeking a declaration against the decision of the PIC should not be allowed on the basis that it is premature at this stage.

SUBSTANTIVE APPEAL

[39] The respondent's complaint in the OS is premised on an alleged non-compliance with the procedures set out in reg 26, which reads as follows:

> 26 Preliminary Investigation Committee
>
> (1) The President of the Council may from time to time appoint a committee from among practitioners who are willing to act, which committee shall be known as a Preliminary Investigation Committee (hereinafter referred to as 'Committee') whose function shall be to make a preliminary investigation into complaints or information touching any disciplinary matter.
>
> (2) A Committee shall consist of such number of members not being less than three nor more than six as the President may from time to time think fit and shall be appointed in connection with one or more than one complaint or information touching any disciplinary matter.
>
> (3) The President may at any time revoke the appointment of any member of any Committee or may remove any member of a Committee or fill any vacancy in any Committee or, subject to sub- regulation (2), increase the number of members of a Committee: *Provided that no act done or proceeding taken under these Regulations shall be questioned on the ground of any vacancy in the membership of or any defect in the constitution of such Committee.*
>
> (4) The quorum of a Committee shall be two.
>
> (5) The President shall nominate a practitioner from among members of a Committee to be the Chairman of such Committee.
>
> (6) The Chairman shall preside at all meetings of such Committee:
>
> *Provided that in the absence of the Chairman the most senior practitioner present at*

that meeting of such Committee shall preside.

(7) The decision of a Committee shall be unanimous or by a majority.

[40] Regulation 26(2) provides that the composition of a PIC shall be not being less than three and not more than six members reg 26(4) deals with the quorum of the PIC, that the 'quorum of a Committee shall be two'.

Sub-regulation 26(2) is directory

[41] It is not in dispute that pursuant to sub-reg 26(2), three persons have been appointed as members of the PIC. However, during the third meeting on 23 April 2014, only the first appellant and Dr Low attended the hearing, following the demise of Dr Ismail. The issue here is whether the quorum of two members attending the third meeting which made the recommendation is valid under the 1974 Regulations

[42] We agree with the learned JC that sub-reg 26(2) provides that the composition of the PIC must not be less than three members However, the learned JC then dismissed the appellants' contention that the PIC and its recommendation was valid as the requisite quorum of two members was met during the third meeting. The learned JC's reasoning is as follows:

Quorum of the PIC

19. The defendants contend that the PIC and its decision was valid as the requisite quorum of two members was met. Under reg 26(4) of the Medical Regulations reg 26(4) the quorum of the PIC is 2 members reg 26(4) states: '(4) The quorum of a Committee shall be two.

20. I accept that this quorum requirement (of two members) was met when the PIC conducted the third hearing and arrived at the decision. However, I think there is a vital distinction between composition and quorum. With its remaining two members, the PIC did satisfy the quorum requirement under reg 26(4). The fact remains however that with its composition of two members then, the PIC contravened reg 26(2). Under reg 26(2), the PIC 'shall' consist of not less than three members.

21. There are numerous authorities to the effect that the word 'shall' is mandatory and thereby imposes an obligation to comply with what is required to be done. (See the Court of Appeal case of *Tan Boon Thien & Anor v Tan Poh Lee & Ors* [2020] MLJU 829). The use of the word 'shall' in reg 26(2) clearly imposes a mandatory requirement that the PIC must consist of at least three members. This compulsory requirement was not met when the PIC sat for the third hearing and when the PIC made its decision. Such breach is not a mere irregularity but goes to the locus and legal competence of the PIC.

[43] We are of the considered opinion that the learned JC was plainly wrong in coming to the above conclusion. In paras [20] and [21] of the grounds of judgment, the learned JC took the view that the usage of the word 'shall' in sub-reg 26(2) of the 1974 Regulations is mandatory and imposed an obligation to comply with the minimum number of the members in the PIC, being three, ignoring the proviso to sub-reg 26(3) and sub-reg 26(4) of the 1974 Regulations.

[44] We are of the considered opinion and we agree with the appellants that if the word 'shall' is read restrictively in its literal meaning and enforceability, it would result in some form of incongruity to the entirety of reg 26 of the 1974 Regulations. This is because the proviso to sub-reg 26(3) expressly provides that no act done or proceeding taken under these Regulations shall be questioned on the ground of any vacancy in the membership of or any defect in the constitution of the PIC.

[45] In *NS Bindra's Interpretation of Statutes* (9th Ed) at p 950, it is stated that:

> The *ultimate rule in construing auxiliary verbs like 'may' and 'shall' is to discover the legislative intent* and the use of words 'may' and 'shall' is not decisive of its discretion or mandates The use of the words 'may' and 'shall' may help the courts in ascertaining the legislative intent without giving to either a controlling or a determining effect. *The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed*. (Emphasis added.)

[46] In *Md Yusoff bin Ahmad v Siti Hajar bt Sarkawi & Anor* [2013] 1 MLJ 329 it was held that although the word 'shall' is used, the court ought to exercise reasonable discretion in adherence to the legislative intent:

> [30] Ordinarily the use of the word 'shall' implies a mandatory obligation but that is not an absolute rule in all cases. In *Bindra, Interpretation of Statutes* (8th Ed), at pp 1029–1030 it is stated as follows:
>
> > The word 'shall' in its ordinary signification is mandatory though there may be considerations which influence the court in holding that the intention of the Legislature was to give discretion. But this word is not necessarily mandatory, nor always mandatory. Whether the matter is mandatory or directory only depends upon the real intention of the Legislature which is ascertained by carefully attending to the whole scope of the statute to be construed.
>
> The use of the word 'shall' would not by itself make a provision of the Act mandatory. It is to be construed with reference to the context in which it is used. *Similarly, mere use of the word 'shall' or the absence of it, does not decide the question whether a provision is directory or mandatory. When a statute uses the word 'shall' prima facie, it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of*

the Legislature, the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non- compliance with the provision, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow there from, and, above all, whether the object of the legislation will be defeated or furthered.

[31] *In the case of State of Haryana v Raghubir Dayal* [1995] SCC (133), the Supreme Court of India had occasion to observe as follows:

> The word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, or consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. *The word 'shall' therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve.* The meaning has to be ascribed to the word, 'shall' as mandatory or as directory, accordingly. (Emphasis added.)

[47] As such, we are of the considered opinion that the mere use of the word 'shall' is not necessarily obligatory but may be considered directory pursuant to the legislative intent. We find that the strict usage of the word 'shall' in sub-reg 26(2) of the 1974 Regulations would simply render the saving provision useless, even though the proviso also uses the word 'shall'.

[48] The existence of the proviso is clearly to cater for and to regularise situations which would result in the vacancy of the membership of the PIC or defect in the composition of the PIC. As such, having construed reg 26 as a whole and the purpose of the proviso to sub-reg 26(3), we find that the word 'shall' is not mandatory, but directory and the non-compliance of the same is saved by the proviso.

Regulation 26 be read as a whole

[49] The learned JC had failed to appreciate that the provision of sub-reg 26(2) cannot be read in isolation, and that all the provisions thereof must be read together as a whole and construed harmoniously with one another to avoid leading to ambiguity or absurdity in the application of law.

[50] In *Majlis Perbandaran Seremban v Tenaga Nasional Bhd* [2020] 12 MLJ 1, the Federal Court held that it is a rule of statutory interpretation that statutes cannot be read in isolation and the provisions of a statute must be read together

as a whole and construed harmoniously with one another to avoid leading to ambiguity or absurdity in the application of law. The Federal Court held as follows:

> [30] The importance of reading an Act as a whole has been emphasised in many cases In *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2019] MLJU 742; [2019] 8 CLJ 433 *this court referred to the case of Reserve Bank of India v Peerless General Finance and Investment Co Ltd* 1987 SCR(2) 1 wherein Chinnappa Reddv J said:
>
> > Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. *A statute is best interpreted when the object and purpose of its enactment is known.* With this knowledge, *the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. It a statute is looked at, in the context of its enactment,* with the glasses of the statute maker, provided by such context its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses *we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.*
>
> [31] It is beyond dispute that each provision or part of a provision must be read in its immediate context and in the context of the Act as a whole. When words are read in their immediate context, the reader forms an impression as to their meaning. Any impression based on immediate context must be supplemented by considering the rest of the Act, including all other provisions of the Act and their various structural components (see: Ruth Sullivan, *Driedger on the Construction of States* (3rd Ed) Butterworths).
>
> [32] Therefore, we say, s 144 of Act 171 cannot be read in isolation from the rest of the provisions in Part XV of Act 171. This is because the legislative scheme provided under Part XV under the heading of 'Rating and Valuation' reflects the whole scope of the Act and the real intention of the enacting body in dealing with this issue. As such. the court must not only consider one section but all sections in Act 171, including the relation of one section to the other sections The relation of a section to the general object intended to be secured by the Act. This is in consonance with the doctrine of harmonious construction as explained by this court in *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1, *where this court held:*
>
> > [78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions To put it simply, *the doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute*. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a

section and other parts of the statute. The five main principles of this doctrine/rule are as follows:

(a) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so as to harmonise them (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57, p 74);

(b) the provision of one section cannot be used to defeat the provision contained in another unless the court. despite all its efforts is unable to find a way to reconcile their differences;

(c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way that effect is given to both provisions as much as possible (see *Sultana Begum v Prem Chand Jain*, AIR 1997 SC 1006);

(d) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see *Commissioner of Income Tax v Hindustan Bulk Carriers* (2002) 13 sec 57, p 74); and

(e) to harmonise is not to destroy any statutory provision or to render it fruitless.

[79] In a nutshell, the doctrine requires that the legislation be construed in a way which would achieve a harmonious result, and that construction should favour coherence in the law. (Emphasis added.)

[51] We are of the considered opinion that the learned JC has failed to appreciate the proviso to sub-reg 26(3), which reads:

> Provided that no act done or proceeding taken under these Regulations shall be questioned on the ground of any vacancy in the membership of or any defect in the constitution of such Committee.

Purpose of a proviso

[52] In *Garden City Development Bhd v Collector of Land Revenue, Federal Territory* [1982] 2 MLJ 98; [1982] 1 LNS 4, at p 100, Lord Keith delivered the following opinion of the Privy Council:

> As a general rule, *the purpose of a proviso is to relax to some extent the full rigour of the main enactment*... (Emphasis added.)

[53] In *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345; [1994] 4 CLJ 285, the Federal Court held as follows:

> Now, the task of construing provisos is not always free from difficulty (see *Gelberg v Milier* [1961] 1 WLR 153, p 159). *A true proviso is something which qualifies or*

modifies the section to which it is a proviso. It must, therefore, be read having regard to the section itself. *Generally speaking, the effect of a proviso is to take out of the section something that would otherwise fall within its ambit*. This principle has been aptly put by Lush J (as he was then) in *Mullins v Treasurer of Surrey* [1880] 5 QBD 170, p 173, as follows:

> When one finds a proviso to the section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso.

However, commenting on this dictum, in his book on *Statutory Interpretation* (2nd Ed), p 494, Mr. Francis Bennion says this:

> ... whilst the substance of this dictum is undoubtly correct, the treatment of the proviso as qualitatively different from the rest of the section is not. The entire section, including the proviso, is an operative component of the Act. (*Gubay v Kington (Inspector of Taxes)* [1984] 1 WLR 163 per Lord Scarman (dissenting, but not on this point at 169-170).

In *Re Memco Engineering Ltd* [1986] Ch 86 at 98 Mervyn Davies J said:

> a *proviso is usually construed as operating to qualify that which precedes* it. A proviso can also be inserted in a statute to make sure that the statute does not have the particular effect that it might have if the proviso were not inserted. (Emphasis added.)

[54] In the present case, the purpose of the proviso is to save or regularise the acts carried out or proceedings taken by the PIC should any defects arise in the constitution of the PIC thereafter. As such, no action or proceeding carried out under this sub-reg 26(2) can be challenged based on the absence of members or any flaw in the composition of the Committee. Therefore, the proviso clearly empowers the PIC to continue with the preliminary investigation of the complaint, even though any defect in the constitution of the PIC may arise upon constituting the same.

[55] However, the learned JC held that the proviso can only save acts or proceedings of the PIC which are done bona fide:

> 29. I disagree. In my opinion, the proviso can save the acts or proceedings of the PIC only if such acts or proceedings were done bona fide. Here the Defendants knew or ought to have known that only two members of the PIC remained at the time of the third hearing and the decision. At the third hearing, P queried the absence of the third member of the PIC. According to para 10 of Pls affidavit affirmed on 3 May 2016, he 'telah membuat pertanyaan mengenai ahli ketiga JSA 1 dan korum bagi penyiasatan tersebut tetapi saya telah dimaklumkan oleh Pengerusi JSA 1 tersebut bahawa penyiasatan tersebut masih boleh dijalankan dengan hanya 2 korum'. At that time, P did not know that the third member Dr Ismail had passed away. P only learnt of Dr Ismail's demise sometime in June 2016. (See paras 10 and 11 of P's

affidavit affirmed on 23 June 2016). D1 simply replied that the investigation can still proceed with a quorum of two members and continued with the hearing. D1 did not inform P of Dr lsmail's demise.

30. P avers that the defendants deliberately withheld a material fact (ie the demise of a member of the PIC), which was in their knowledge at all material time. (See paras 34 and 35 of P's affidavit affirmed on 4 July 2016). The defendants on the ·other hand say that there is no need for the PIC to inform P about the reason for the absence of its third member. (See para 10 of the affidavit affirmed on 27 June 2016 filed by the defendants). From this, I infer that the defendants indeed knew of Dr Ismail's demise but chose not to disclose that information even when expressly queried by P. In this regard, I think the PIC was not transparent and forthright. The PIC, in my view, did not act in a manner that was bone fide.

...

33. Applying *Sazean* again to the instant case, the Defendants were well aware that only two members of the PIC remained at the time of the third hearing and the decision. Instead of appointing a third member in order to fulfil the minimum number required under reg 26(2), the defendants chose to proceed with a PIC which by then was legally incompetent and improperly constituted. The defendants intentionally withheld the fact of Dr Ismail's demise from P. I do not think the defendants can be said to have acted bona fide or in good faith. As such, I am of the opinion that the proviso cannot be invoked to save the third hearing or the decision.

[56] In the first place, 'bona fide' is not part of sub-reg 26(2) and there is no legal requirement in reg 26 or the 1974 Regulations that require the MMC to inform the respondent of the demise of a member of the PIC. Added to that, how is the failure to inform the respondent of the demise of Dr Ismail amount to an act that is not bona fide, an act not in good faith. Further, the first appellant had made known to the respondent and his four counsels that there were only two members of the PIC:

I would like to introduce formally members of the committee (PIC). I am Dato' Dr Mahmud, I am the chairperson. And the other member of the committee is Dr Low Nan Hang. There are only two of us but we make a quorum.

[57] Although the demise of Dr Ismail was not specifically disclosed during the third hearing, the first appellant made it clear at the outset of the third hearing that the members of the PIC consisted of only two. The respondent and his counsels, upon becoming fully aware of the number of the members in the PIC, and that the third hearing would be conducted with the two members of the PIC, did not raise any objection with respect to the same, and elected to proceed with the third hearing.

[58] In any event, the learned JC has erred in law by adding a new requirement of 'bona fide' into reg 26 when the same is not expressly provided for in the said provision. In *Malayan Banking Berhad v International Tin*

Council and another appeal [1989] 3 MLJ 286, the Supreme Court observed that:

> As stated by Lord Halsbury LC in the Salomon case ... ,*the court has 'no right to add to the requirements of the statute*, nor to take from the requirements thus enacted ... As stated by Lord Selborne LC in *AG v Great Eastern Railway C*..., 'It would, however, be contrary to sound principle to imply such a condition, not expressed in the clause, if the words, as they stand would be sensible and operative without it.' Indeed, Lord Russell, in *Evans v Bartlam* ... ruled that, 'it would be adding a limitation which the rule does not impose or re-writing of the section which Parliament had failed to do so ... (Emphasis added.)

[59] In *Wan Khairani binti Wan Mahmood v Ismail bin Mohamad & Anor* [2008] 1 MLJ 164, this court has held that where a prescribed law employs words and language which are clear and void of any ambiguity, no external aid would be necessary to give effect to the prescribed law, and it should be interpreted as it is without having to add, subtract or omit any words

[60] Therefore, premised on the case of *Wan Khairani*, we are of the considered opinion and we agree with the appellants that the learned JC was wrong to have disregarded and departed from the clear and unambiguous words used in the proviso and imposed the bona fide qualification.

[61] In any event, this saving provision now appears as part of sub-reg 37(7) of the 2017 Regulations, which re-affirms the validity of the acts of the PIC in the event of any defects or vacancy in the constitution of the PIC, which is consistent with the proviso:

> 37 Provisions relating to the Preliminary Investigation Committee of the Disciplinary Board
>
> ...
>
> (7) *No act done or proceeding taken by the Preliminary Investigation Committee* or the Disciplinary Board, as the case may be, *shall be invalid on the ground of* —
>
> (a) *any vacancy in the membership of or any defect in the constitution of the Preliminary Investigation Committee* of the Disciplinary Board; or
>
> (b) any omission, defect or irregularity not affecting the merits of the case. (Emphasis added.)

Sub-regulation 26(4)

[62] We are also of the considered opinion and we agree with the appellants that the learned JC had fallen into error when he placed great emphasis on sub-reg 26(2) of the 1974 Regulations, and gave scant consideration to sub-reg 26(4) and the proviso to sub-reg 26(3). We find that the learned JC's

A interpretation of reg 26 is flawed as he had placed sub-reg 26(2) to prevail over the other provisions of reg 26, thereby explicitly prioritising one particular sub-regulation over the others

B **[63]** Sub-regulation 26(2) is on the composition of the PIC, the members who make up the PIC. However, sub-reg 26(4) is on the quorum required for a meeting. In LB Curzon 'A Dictionary of Law', the word 'quorum' is defined as 'to indicate the specified number of members of a body, in the absence of which it cannot formally meet or act legally'.

C

[64] In the context of this appeal, the respondent's challenge is on the quorum of the third meeting that deliberated the recommendation. Since the respondent is challenging the validity of the third Meeting, we are of the considered opinion that the validity of the third meeting can only be D questioned if there is a breach of sub-reg 26(4), in that there was a quorum failure when less than two members meet and made the recommendation. However, there is no quorum failure during the third meeting as both the first appellant and Dr Low had attended the said hearing.

E **[65]** We find that sub-reg 26(2) cannot be read into or prevail over sub-reg 26(4), as that will render sub-reg 26(4) to be useless. A rule in statutory interpretation is that Parliament does not act in vain, and every word in reg 26 must be given its effect. As held by the Supreme Court in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] CLJ Rep 122, there F is a purpose to every word in a statute:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was G put there for a purpose and must not be disregarded.

[66] In the Federal Court case of *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ H 721; [2020] 7 CLJ 561, it was held that:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of I the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless a clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in

construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 *provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain, and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed* ... (Emphasis added.)

[67] In *Pihak Berkuasa Tatatertib Majlis Perbandaran Seberang Perai & Anor v Muziadi bin Mukhtar* [2020] 1 MLJ 141; [2020] 1 CLJ 1, the Federal Court held as follows:

[78] In this regard, it would be convenient for us to discuss the doctrine of harmonious constructions To put it simply, the *doctrine of harmonious construction means a statute should be read as a whole and one provision of the Act should be construed with reference to other provisions in the same Act so as to make a consistent enactment of the whole statute. Such an interpretation is beneficial in avoiding any inconsistency or repugnancy either within a section or between a section and other parts of the statute.* The five main principles of this doctrine/rule are as follows:

(a) the court must avoid a head on clash of seemingly contradictory provisions and they must construe the contradictory provisions so to harmonise them (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74*);*

(b) the provision of one section cannot be used to defeat the provision contained in another unless the court, despite all its efforts, is unable to find a way to reconcile their differences;

(c) when it is impossible to completely reconcile the differences in contradictory provisions, the courts must interpret them in such a way that effect is given to both provisions as much as possible (see *Sultana Begum v Prem Chand Jain AIR* [1997] SC 1006 at pp 1009–1010);

(d) courts must also keep in mind that interpretation that reduces one provision to useless or dead lumber is not harmonious construction (see *Commissioner of Income Tax v Hindustan Bulk Carriers* [2002] 3 SCC 57 at p 74); and

(e) to harmonise is not to destroy any statutory provision or to render it fruitless. (Emphasis added.)

[68] In the premise, we are of the considered opinion that the learned JC was plainly wrong in his finding when he only referred to and relied on sub-reg 26(2) of the 1974 Regulations and effectively rendered sub-reg 26(2) to prevail over the other provisions of reg 26, in particular sub-reg 26(4) and the proviso to sub-reg 26(3).

[69] In paras 22 to 26 of the grounds of judgment, the learned JC relied on

A the case of *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495, which referred to ss 122 and 127 of the Companies Act 1965, to support his findings on the capacity of the PIC in making the recommendation, and that because the membership of the PIC did not comply with sub-reg 26(2) of the 1974 Regulations, the PIC lacked the B necessary legal competency and locus standi to make the recommendation.

[70] We are of the considered opinion and we agree with the appellants that there is a stark distinction between the function of the PIC and the Board of Directors ('BOD'). A BOD is necessary to run a corporate entity whilst the C PIC is a regulatory body to commence preliminary disciplinary inquiries into complaint(s) made against medical practitioner(s). There is simply no reasonable comparison between these two entities. Added to that, any impairment to the membership of the PIC or defect in the composition of the PIC is regularised by the proviso to sub-reg 26(3).

D

CONCLUSION

[71] For the reasons enumerated above, we are of the considered opinion that the quorum of all the three hearings of the PIC was met. As such, and as E empowered by the proviso, the acts carried out or proceedings that were taken by the PIC cannot be invalidated despite the vacancy in its membership.

[72] Therefore, we find merit in the appeal and the appeal is allowed and the decision of the learned JC is set aside.

F

Appeal allowed.

Reported by Ashok Kumar

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H

I